

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SUSAN C. REEVES)	
Claimant)	
)	
VS.)	
)	
KELLY SERVICES, INC.)	
Respondent)	Docket No. 1,069,502
)	
AND)	
)	
INDEMNITY INS. CO. OF N. AMERICA)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) requested review of the May 14, 2014, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh. Gary L. Jordan of Ottawa, Kansas, appeared for claimant. Eric T. Lanham of Kansas City, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found:

Both Dr. Jones and Dr. Samuelson examined the claimant and found the claimant injured the shoulder in the course and scope of employment. Jones described the injury as a SLAP tear and recommended surgery. Both physicians recorded a history of injury substantially consistent with the claimant's testimony, and both physicians were aware of the prior shoulder injury.

The preponderance of the evidence showed the claimant injured her right shoulder from the traumatic December 6, 2013 work accident. The respondent and insurance carrier shall provide the claimant treatment for the injury as recommended by Dr. Jones.¹

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 14, 2014, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

¹ ALJ Order (May 14, 2014) at 1-2.

ISSUES

Respondent requests review of whether claimant's accidental injury on the date alleged arose out of and in the course of employment with respondent and whether the ALJ exceeded his authority in granting claimant's benefits.

Claimant argues the ALJ's Order should be affirmed.

The issues for Board review are:

1. Did claimant's alleged injury arise out of and in the course of employment?
2. Did the ALJ err in granting benefits?

FINDINGS OF FACT

Respondent is a temporary employment placement agency. Respondent assigned claimant to work at American Eagle Outfitters in Ottawa, Kansas, as a picker on August 10, 2013. In this position, claimant worked at the distribution center picking items from boxes and placing the items into plastic tubs. Claimant testified the plastic tubs moved between stations on conveyor belts, and she was not required to lift or physically move the plastic tubs. Claimant explained the shelves, located alongside the conveyor belt, stood over six feet tall, and were slanted with rollers. This allowed the boxes on the rear of the shelf to move forward when the front box was removed. Each shelf had a small lip on its edge which prevented the boxes from rolling off of the shelf. Claimant stated the boxes measured approximately two feet by three feet, and each box had an opening on the front which allowed claimant to reach inside to remove items. Claimant testified she is five feet eight inches tall, and therefore, she stood on her tiptoes to reach the highest shelf.

On December 6, 2013, claimant was removing items from boxes on a top shelf for loading into the plastic tubs. Claimant stood on her tiptoes and fully extended her right arm overhead to reach into the front box. Claimant testified the box was nearly empty, and she tilted the box forward in order to reach the items remaining at the rear of the box. When the front box was tilted, the full boxes behind it on the rollers shifted forward. Claimant's right arm was fully extended inside the front box when the shifting occurred, and her right shoulder was struck by the front box. Claimant testified the force of the box striking her right shoulder caused a burning pain. Claimant further stated the front box did not leave the shelf, but rather the top of the box went over the lip, and the bottom of the box remained on the shelf behind the lip. Claimant testified she replaced the front box by reaching underneath the rollers with her left hand and pushing the full boxes back.

Claimant immediately reported the accident to the floor supervisor. She was then escorted to respondent's office and completed paperwork before she was sent home with an ice pack for her right shoulder. Claimant returned to respondent the following day to

speak with the safety lead, and she was advised later that day to seek medical treatment at Lawrence Occupational Health.

Claimant treated with various doctors at Lawrence Occupational Health for approximately three months. Claimant was given medication, physical therapy, and restricted to light duty activities. The physical therapy was not beneficial, and the physicians at Lawrence Occupational Health recommended claimant be seen by an orthopedic surgeon. Respondent furnished claimant with a light duty position at a different location.

Claimant testified she underwent prior surgery on her right shoulder in 2009. Claimant stated her injury was not a workers compensation claim nor did she receive a settlement related to her injury. Claimant underwent a right shoulder arthroscopy with labral and rotator cuff debridement and acromioplasty. Claimant testified she fully recovered and had no further symptoms or medical treatment following the 2009 surgery.

Dr. Lowry Jones, an orthopedic surgeon, first examined claimant on March 6, 2014, after her referral from Lawrence Occupational Health. Dr. Jones reviewed claimant's history and medical records, which included an MRI taken at St. Francis Radiology following the December 2013 incident. Dr. Jones reported the MRI demonstrated rotator cuff tendinitis with a SLAP tear.² Following a physical examination, Dr. Jones determined claimant sustained a right shoulder partial rotator cuff tear, a right shoulder SLAP tear, and right shoulder pain. Dr. Jones recommended claimant undergo a right shoulder arthroscopy with SLAP repair, repeat acromioplasty, and continue with light duty restrictions of no lifting over five pounds, reaching, pushing, or pulling with the right arm. He noted:

It is my opinion, to a reasonable degree of medical certainty, that [claimant's] complaints and diagnosis are related to her work injury on Dec. 6, 2013. I believe her work activities are the prevailing cause of her current diagnosis and the need for treatment.

She has had previous right shoulder arthroscopy with labral debridement rotator cuff debridement and acromioplasty. There is significant signal seen under the superior labrum indicating no SLAP repair was performed. I believe this is an acute injury, which occurred on her stated date of December 6, 2013.³

Claimant returned to Dr. Jones on April 10, 2014. Surgical treatment recommended by Dr. Jones was not approved, based upon an additional radiologist opinion that the MRI scan showed no pathology. Claimant was instead directed to return to Dr. Jones for pain

² SLAP is an acronym for "Superior Labral Anterior to Posterior" tear.

³ P.H. Trans., Cl. Ex. 1 at 2-3.

control before obtaining a second opinion from another physician. Dr. Jones determined claimant's diagnoses, treatment recommendations, and causation opinion had not changed. Dr. Jones wrote in his report:

MRI scan has been extremely well proven to show only portions of pathology. In my experience, more than 50% of the shoulder arthroscopies I completed pathology unrecognized on MRI scan. Some extremely significant.

I have made a recommendation, which was not approved and therefore had no other treatment options for her.⁴

Dr. Thomas Samuelson, an orthopedic surgeon, evaluated claimant on May 6, 2014, at respondent's request for purposes of an independent medical evaluation. Claimant complained of pain at the lateral aspect of the right shoulder, decreased strength and range of motion, occasional muscle spasms and coolness in the arm, and occasional numbness in the right upper extremity. After reviewing claimant's medical records, history, and performing a physical examination, Dr. Samuelson diagnosed claimant with right chronic rotator cuff tendinosis, possible right partial supraspinatus tear, and right acromioclavicular arthritis. Dr. Samuelson recommended claimant receive a cortisone injection, and if the injection does not provide significant improvement, then claimant should undergo a more aggressive arthroscopic procedure to the right shoulder. Further, Dr. Samuelson suggested claimant continue physical therapy and anti-inflammatory medication following the injection. He noted the necessary light duty restrictions of no overhead lifting and no lifting over five pounds were due to claimant's injury on December 6, 2013. Dr. Samuelson wrote:

I do not feel that her current problems are due to her prior shoulder problems and surgery, which she had on 06/02/2009. Based on my review of the records, she did quite well after that procedure and did not have any further limitations. If she responds to the recommended injection and continues to do well she may progress to be able to return to regular activities and full-duty work in 4 to 8 weeks. If she did not respond to the injection and required surgery, then she may require an additional 2 to 4 months prior to returning to full duty, depending on the extent of the pathology and the treatment required based on the arthroscopic examination.⁵

Claimant continues to work for respondent in a light duty position.

⁴ *Id.* at 6.

⁵ P.H. Trans., Cl. Ex. 2 at 3-4.

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-501b(a)(b)(c) states:

(a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2013 Supp. 44-508(d) states:

"Accident" means an undesignated, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2013 Supp. 44-508(f) states, in part:

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor.

An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

K.S.A. 2013 Supp. 44-508(g) states:

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.

ANALYSIS

Respondent argues claimant did not suffer an injury arising out of her employment. Respondent cites the impossible scenario described by claimant regarding the circumstances of the injury. Specifically, respondent cited matters of ergonomics, including claimant's height, shelf heights, and box weights and dimensions. No evidence was presented to support the specifics alleged or conclusions of respondent's argument.

Claimant's testimony regarding the details of her accident is uncontroverted. Dr. Jones wrote the described accident was the prevailing factor of her current diagnosis and need for treatment. Dr. Samuelson wrote the described accident is capable of causing her shoulder injury. Dr. Samuelson specifically stated her current condition was not related to her preexisting problems. All of the medical opinions are also uncontroverted. Uncontroverted evidence may not be disregarded and is generally regarded as conclusive absent a showing it is improbable or untrustworthy.⁶ The evidence presented supports the ALJ's finding claimant suffered an injury by accident arising out of her employment with respondent.

Respondent also included as an issue the ALJ exceeded his jurisdiction by granting benefits. K.S.A. 2013 Supp. 44-551(l)(2)(A) gives the Board jurisdiction to review decisions from a preliminary hearing in those cases where one of the parties has alleged the ALJ exceeded his or her jurisdiction. K.S.A. 44-534a(a)(2) limits the jurisdiction of the Board to the specific jurisdictional issues. K.S.A. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment, the payment of medical compensation, and the payment of temporary disability compensation. K.S.A. 44-534a

⁶ See *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

also specifically gives the ALJ authority to grant or deny the request for medical compensation pending a full hearing on the claim. The ALJ had jurisdiction to order medical treatment in this instance.

CONCLUSION

Claimant suffered an injury by accident arising out of her employment with respondent on August 10, 2013. The ALJ had jurisdiction to order medical treatment.

ORDER

WHEREFORE, it is the finding of this Board Member that the Order of administrative Law Judge Kenneth J. Hursh dated May 14, 2014, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July 2014.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Kenneth J. Hursh, Administrative Law Judge